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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 521

PITTSBURGH PLATE GLASS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 523

CRYSTAL CITY GLASS WORKERS' UNION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 545–552) is reported in 113 F. (2d) 698. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 430–452) are reported in 15 N. L. R. B. 515.

JURISDICTION

The decree of the court below (R. 552–553) was entered on July 23, 1940. Motions for rehearing by petitioner Pittsburgh Plate Glass Company, herein called the Company (R. 553–567), and by petitioner Crystal City Glass Workers' Union, herein called Crystal City Union (R. 568–571), were denied August 12, 1940 (R. 571–572). Separate petitions for certiorari were filed by the Company and by Crystal City Union on October 23 and October 25, 1940, respectively. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board's determination of the unit appropriate for collective bargaining is supported by substantial evidence.

2. Whether the Board erred in excluding certain evidence offered by each petitioner with respect to the representation question, and whether the court below erred in denying the petitions of the Company and of Crystal City Union to adduce such evidence.

3. Whether Section 9 (b) of the Act represents an unconstitutional delegation of legislative power to the Board.[1]

[1] The first and second questions are raised in both petitions; the third question is raised only by the Company.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are set forth in the Appendix to the petition of the Company, No. 521.

STATEMENT

Upon the petition and amended petition (R. 354A–354B) of Federation of Flat Glass Workers of America, herein called the Federation, the Board ordered an investigation of questions concerning the representation of employees at certain of the Company's plants (R. 355–356). After the usual proceedings had pursuant to Section 9 of the Act, including a hearing before a trial examiner (R. 357), the filing of briefs before the Board, and oral argument (R. 365–366), the Board issued its decision and certification of representatives (R. 42–56, reported in 10 N. L. R. B. 1111); it found that the production and maintenance employees (with minor exceptions) of the Company at its six flat glass plants constitute a unit appropriate for collective bargaining, within the meaning of Section 9 (b) of the Act, and certified the Federation as the exclusive representative of all employees in such unit.

Thereafter, a charge having been filed by the Federation (R. 38A), the Board issued a complaint (R. 34–37) against the Company alleging that it had refused to bargain collectively with the Fed-

eration as such duly certified employee representative, in violation of Section 8 (1) and (5) of the Act. The Company's answer admitted that it had refused to bargain with the Federation but denied, upon the ground that the Board's prior certification was arbitrary and invalid, that such refusal violated the Act (R. 444–445, 40–42). Following the usual procedural steps under Section 10 of the Act,[2] the Board issued its findings of fact, conclusions of law, and order (R. 430–452). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[3]

The Company's extensive operations in manufacturing and selling various types of industrial products are separated into five main divisions (R. 45–46, 436; 359–362, 67); one of these, the flat glass division (with which this case is concerned), comprises six plants located in five States, viz., Ford City, Pennsylvania; Creighton, Pennsylvania; Mt. Vernon, Ohio; Clarksburg, West Vir-

[2] These included a hearing before a trial examiner at which Crystal City Union intervened (R. 20), intermediate report of the trial examiner, exceptions thereto by the Company and Crystal City Union (R. 368–410, 411–425), the filing of briefs before the Board and oral argument (R. 429). No question is raised as to these procedural steps, nor is the jurisdiction of the Board questioned.

[3] The following statement necessarily covers the findings in both the representation proceeding and the unfair labor practice case (see Section 9 (d)); the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence or stipulation of the parties.

ginia; Henryetta, Oklahoma; and Crystal City, Missouri (R. 45–47, 436–437; 360–362, 67).[4] The flat glass division is operated "quite separately" from the Company's other main divisions, and has its own labor policies, determined for all six plants (R. 48; 74–75, 97–98, 109–111, 114, 127–128, 122–124, 235, 240). Wages, hours, and working conditions—the normal objects of collective bargaining—are substantially similar at all of these plants; so, too, are the manufacturing processes and the skills required therein (R. 53; 82–84, 96–97, 115, 122–124, 142, 202–203, 235–236).

The Federation, formed in 1933, sought from the beginning to organize and to bargain for the production and maintenance employees at all six glass plants as a single unit (R. 49–50, 441; 164–165, 168). Under three successive agreements between the Company and the Federation, covering the period from November 1934 to January 1937, the Company recognized the Federation as bargaining representative of its members throughout the flat-glass division, including the comparatively small number of its members employed in the Crystal City plant (R. 50, 439–441; 79, 173–174, 275–321, 106). A fourth collective agreement made on January 20, 1937, was, over the Federation's

[4] Two other plants, while grouped in the flat glass division, produce different products; no party objected to excluding them from consideration with the glass plants (R. 47, 48–49).

objection, limited to the five plants other than Crystal City (R. 50, 443; 83, 173–174).[5]

It is stipulated that the Federation represents a majority of all the production and maintenance employees at the six plants taken together, as well as a majority at each plant except Crystal City, where approximately one-fourth of the employees are Federation members (R. 49–50, 55; 166, 190–191, 200). The Crystal City Union offered in evidence a petition, signed by over 1,300 (a large majority) of the employees at the Crystal City plant, whom that organization claimed to represent, stating their desire to have the Crystal City plant as a separate bargaining unit (R. 51; 251–254. The Board found, however, that the Crystal City Union could no longer function as a labor organization, and that its membership and representation could not be considered as expressing the free choice of the employees (R. 50–51, 439), for the reason that, by an order of the Board entered upon consent of the Company and enforced by the court below, the Company had been required to withdraw all recognition from the

[5] While the Board made no express finding upon the matter, it is undisputed that, in accordance with its policy of maintaining uniformity in wages and other working conditions at all plants (see *supra*, p. 5), the Company put into effect at Crystal City, as well as at the other plants, a wage increase obtained by the Federation in the 1937 agreement (R. 236, 203, 175).

Crystal City Union as a bargaining representative of any of the Company's employees.[6]

Upon the foregoing subsidiary findings, the Board found in the representation case that the production and maintenance employees (with certain immaterial exceptions) at the Company's six flat-glass plants constitute a unit appropriate for collective bargaining (R. 54–55). Adhering to this finding in the unfair-labor-practice case (R. 444), one member dissenting (R. 448–452), the Board concluded that the Company had violated Section 8 (5) and (1) of the Act by refusing to bargain with the Federation as the exclusive representative of the employees in the unit found (R. 447). The Board ordered the Company to cease and desist from these unfair labor practices; to bargain collec-

[6] *Matter of Pittsburgh Plate Glass Co.*, 8 N. L. R. B. 1210, enforced *sub nom. National Labor Relations Board* v. *Pittsburgh Plate Glass Co.*, 102 F. (2d) 1004 (C. C. A. 8). See R. 343–352. The order was issued, prior to the hearings in either of the instant proceedings, in a proceeding against the Company under Section 10 of the Act instituted upon a complaint of the Board alleging that the Company had dominated and interfered with Crystal City Union in violation of Section 8 (1) and (2). Before any evidence was adduced, a stipulation (R. 345–349) was entered into by the Board and the Company, by which the latter consented to an order of the Board in the terms above set forth and to the entry of an appropriate court decree of enforcement. Crystal City Union did not appear or attempt to intervene either before the Board or in the reviewing court (R. 51, 430–431, 434).

tively, upon request, with the Federation as the exclusive representative as aforesaid; and to post appropriate notices (R. 447–448).

On September 22, 1939, the Company and Crystal City Union filed in the court below separate petitions to review and set aside the Board's order (R. 469–506, 507–517). The Board answered, requesting enforcement of its order against the Company (R. 527–530, 531–534, 535–536). On February 7, 1940, the Company and Crystal City Union filed in the court below separate petitions for leave to adduce additional evidence (R. 536–540, 540–543), which are described in greater detail *infra*, pp. 10–13. On July 23, 1940, the court handed down its opinion (R. 545–552) and entered its decree (R. 552–553) denying the petitions of the Company and Crystal City Union to adduce additional evidence and enforcing the Board's order. Petitions for rehearing filed by the Company and Crystal City Union (R. 553–567, 568–571) were denied (R. 571–572).

ARGUMENT

I

The Board's finding that the designated employees in the six plants of the Company's flat glass division constitute a unit appropriate for collective bargaining was sustained by the court below (R. 550); the renewed challenge to the finding here presents no question of general importance.

Further, the evidence summarized in the statement (*supra*, pp. 4–7) affords full support for the

challenged finding. It is clear that all the employees in the unit found appropriate are linked by an identity of interest in the usual objects of collective bargaining by reason of the similarity of employment conditions and manufacturing processes; that they are subject to a common centralized control and a unified employer labor policy in the unit; and that the form of their self-organization and the history of their previous dealings with the Company manifest the desire of a majority of the employees for, and the feasibility of, bargaining on the basis of a division-wide unit. The Board was plainly warranted in giving controlling weight to these factors, in accordance with its established principles and practice in making unit determinations;[7] they fully support its ultimate conclusion.[8] The decisions are uniform that such a determination by the Board is final where not clearly arbitrary.[9] *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138, 143 (C. C. A. 9),

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[7] For a full discussion of the significance of these factors, and their consistent application by the Board, see Third Annual Report of the National Labor Relations Board (G. P. O. 1939), pp. 156–180; Fourth Annual Report of the National Labor Relations Board (G. P. O. 1940), 89–91.

[8] This is true entirely apart from the coerced nature of the contrary desires expressed through the Crystal City Union; giving effect to the wishes of an overwhelming majority of all employees at the six plants fully conforms to the principle of majority rule (Sections 9 (a), 8 (5)).

[9] The Company's assertions that the Board "capriciously" departed from its own precedents (Pet. 12) and that the court below substituted its findings for those of the Board (Pet. 12, 16) are not supported by any citations to Board decisions or to the record.

certiorari denied, 304 U. S. 575; *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815, 819 (C. C. A. 8); *National Labor Relations Board* v. *Piqua Munising Wood Products Co.*, 109 F. (2d) 552, 554 (C. C. A. 6); *International Assn. Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 34, 35 (App. D. C.), affirmed in other respects, No. 16, this Term; *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 789 (C. C. A. 9), certiorari pending, No. 352, this Term; *Bussman Mfg. Co.* v. *National Labor Relations Board*, 111 F. (2d) 783, 785 (C. C. A. 8).

II

The contentions (Company Pet. 13, 16; Crystal City Union Pet. 5, 7–11) that the Board arbitrarily excluded certain evidence offered at the hearing (R. 23–24, 26–31; 249–251) and that the court below erred in denying petitions for leave to adduce such evidence, are without merit. In summary, this evidence was offered to show (1) that the Company had not dominated, interfered with, or contributed support to Crystal City Union; (2) that 1,500 of the 1,800 employees at the Company's Crystal City plant belong to Crystal City Union and prefer it to the Federation as their bargaining representative, and that the membership of Crystal City Union increased after the Company had been required to withdraw recognition from it and after the Board had certified the Federation as the em-

ployees' bargaining representative in the unit found appropriate; (3) that the Company bargained with Crystal City Union on behalf of its members until the charges of company-domination were filed with the Board; and (4) that the Crystal City employees have interests distinct from the employees at the Company's other plants within the unit found.

Part (1) of the offered proof is plainly inadmissible. The order of the Board and decree of the court below requiring the Company to withdraw all recognition from Crystal City Union as the representative of the Company's employees (*supra*, pp. 6–7) permanently incapacitated that organization as an employee bargaining representative.[10] *National Labor Relations Board* v. *Falk Corporation*, 308 U. S. 453; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241. Consequently, the propriety of the Com-

[10] The validity of this order is not affected by the fact that Crystal City Union was not a party to the proceeding. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350. The Company's argument that the order is not shown to have been based upon its domination and support of the organization (Pet. 15) ignores the provision of the order requiring it to cease and desist from dominating or interfering with the organization, or from recognizing it as a labor organization (R. 351), entered upon a complaint charging domination and interference (R. 344), and upon a stipulation that the Company would cease and desist from such unfair practices as had occurred in the past, and would cease dominating and interfering with the Crystal City Union (R. 347–348).

pany's relations with the Crystal City Union was not in issue at the hearings in this case.

Parts (2) and (3) of the proffered evidence were likewise properly excluded. The evidence before the Board (*supra,* p. 6) adequately disclosed that the Federation represented only a minority of the employees at Crystal City, and that a majority of the employees at that plant preferred to be placed in a separate unit for representation by the Crystal City Union. Since that union had been disqualified as a bargaining agent, the additional facts that this employee majority belonged to and had bargained through that organization were immaterial. In any event, the Board assumed these facts to be true in determining the appropriateness of the unit (R. 435, 439); hence no possible prejudice could arise, as the court below noted (R. 551, 552).

Nor did any prejudice result from rejecting part (4) of the offered proof, relating to the separate interests of the Crystal City employees, the exclusion of which is complained of only by Crystal City Union. All parties, including the Crystal City Union, were afforded full opportunity to present such evidence in the prior representation hearing, wherein the unit issue was initially determined. Indeed, the record shows that counsel for the Crystal City Union adduced much evidence along these lines at that time (see R. 146–149, 205–207, 219–221), as did the other parties (see R. 221–

229, 233, 238, 241–243). There is no contention or showing that any such evidence was then excluded, or that the later offer comprehended new matter not theretofore available.

III

The Company, in support of its contention that Section 9 (b) of the Act constitutes an unconstitutional delegation of legislative power to the Board (Pet. 5, 13, 16), suggests that the court below held the Board's power of determining the unit to be unlimited (Pet. 13). The suggestion ignores the court's reference to standards governing exercise of the Board's authority (R. 549). The standards so established in Section 9 (b) include (1) the primary requirement that the unit be either "the employer unit, craft unit, plant unit, or subdivision thereof"; and (2) the further requirement that the choice of unit made be one which will "insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise * * * effectuate the policies of this Act".

In *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, Section 9 (b) of the Act was vigorously challenged on the precise ground urged by the Company here.[11] The Court found it unnecessary to discuss this ob-

[11] Brief for Respondent (No. 722, Supreme Court, October Term, 1936), pp. 74–76.

jection. In subsequent cases, some thirty in number, orders of the Board based upon findings of refusal to bargain have been repeatedly sustained and enforced by this Court and by the various Circuit Courts of Appeals;[12] every such case, of course, involves an exercise of the Board's power under Section 9 (b) to determine the proper bargaining unit.

CONCLUSION

The petitions herein present no question of general importance and there is no conflict of decisions; they should, therefore, be denied.

Respectfully submitted.

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National Labor Relations Board.

NOVEMBER 1940.

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[12] See, for example, in addition to the cases cited *supra*, pp. 9–10, *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318; *International Assn. of Machinists* v. *National Labor Relations Board*, decided November 12, 1940 (No. 16, this Term), affirming 110 F. (2d) 29 (App. D. C.); *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601.

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